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IN THE  
**Supreme Court of the United States**

**OCTOBER TERM, 1996**

**AMCHEM PRODUCTS, INC., ET AL.,**

*Petitioners,*

v.

**GEORGE WINDSOR, ET AL.,**

*Respondents.*

On Writ Of Certiorari To The  
United State Court of Appeals  
for the Third Circuit

**AMICUS CURIAE BRIEF OF  
THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA  
IN SUPPORT OF THE PETITIONERS**

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BRIEF OF AMICUS CURIAE  
THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA  
IN SUPPORT OF RESPONDENTS

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**IDENTITY AND INTEREST OF *AMICUS CURIAE***

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association whose approximately 60,000 members primarily represent plaintiffs in civil actions. Victims of asbestos-related disease are frequently represented by ATLA members in their civil suits.

Letters of consent of the parties to the filing of this brief have been filed with the Court.

ATLA does not appear before this Court as an opponent -- or a proponent -- of class actions in mass torts. Rather, ATLA's concern in this case is defined by its longstanding

mission, stated in its bylaws: "To preserve the constitutional right to trial by jury." ATLA declared its position regarding class actions in a formal resolution adopted by its Board of Governors on Oct. 5, 1996:

Class actions can be important procedural vehicles utilized by consumers and others to halt and deter wrongful conduct. However, class actions have the potential to affect individual rights, and potentially may interfere with an individual plaintiff's exercise of the right to legal counsel and the right to trial by jury. . . .

ATLA believes . . . that any waiver of the right to a jury trial should be a knowing and informed choice of the plaintiff [and] that plaintiffs are entitled to counsel of their choice whose loyalty is undivided by any conflict of interest. Accordingly, ATLA opposes the implementation of class action procedures unless each claimant is afforded the fullest opportunity to exercise a knowing and intelligent waiver of jury trial and a meaningful opportunity to opt out of the binding effect of such proceedings.

In ATLA's view, the question presented in this case raises the issue of judicial protection of the constitutional right to trial by jury. The standard advocated by Petitioner for certifying a class action for purposes of settlement would effectively permit the parties to trade away the jury trial rights of those who will develop asbestos disease in the future. By taking into account the terms of the settlement in applying Fed. R. Civ. Pro. 23, courts allow the parties to remove issues from judicial scrutiny, including the rights of future victims. Essentially, this standard would render the Seventh Amendment rights of future victims "invisible."

ATLA addresses this Court to defend the right to trial by jury against such an erosion. ATLA further suggests that the constitutional rights of future victims can be preserved without destroying the effectiveness of the class action as a means of resolving disputes in a just and efficient manner.

## SUMMARY OF THE ARGUMENT

The question presented in this case raises serious issues regarding judicial protection of the right to trial by jury. The class in this case includes not only those who have current claims for asbestos-related harms, but also those who will develop asbestos disease in the future. The standard advocated by Petitioners would require judges considering the certification of class actions to take into account the fact that some issues have been settled. It would allow current claimants to trade away the jury trial rights of future victims in a manner that is largely invisible to judicial scrutiny.

The history of the Seventh Amendment illustrates the importance of the right to trial by jury to both the civil justice system and democratic self-government. This Court has long required close judicial scrutiny of any infringement of that right.

The infringement is accomplished in this case by shifting the legal claims of asbestos victims, to which the Seventh Amendment applies, to an administrative compensation scheme. This is a type of denial of jury trial rights that the Seventh Amendment was specifically designed to prevent, and this Court has invalidated an attempt by Congress to evade the right to trial by jury in similar fashion.

The notice and opportunity to opt out of the class did not preserve the rights of future victims. The failure by an individual who has not yet suffered asbestos injury to execute and submit opt-out form cannot be deemed a knowing and intelligent waiver of the right to trial by jury.

The prospect of administrative efficiency and lower transaction costs do not trump the Seventh Amendment. However, the rights of futures can be preserved without destroying or crippling the class action. This can be accomplished by conditioning the certification of a settlement class action on modification of the agreement. That modification would provide that future victims shall have a

reasonable period of time following discovery of the disease in which to choose between the terms of the settlement or and a tort action with the right to a jury trial.

## ARGUMENT

### I. CONSIDERATION OF SETTLEMENT IN CERTIFYING A CLASS ACTION INVOLVING THE MONETARY CLAIMS OF FUTURE ASBESTOS VICTIMS RATIFIES THE TRADING AWAY OF FUTURE CLAIMANTS' RIGHT TO TRIAL BY JURY.

In the coming years, a significant number of Americans who are presently in good health will receive bad news from their doctors. They will have developed cancer, mesothelioma, or other disease caused by asbestos in the air where they worked years ago. If the settlement at issue in this case is approved, many workers will get a second dose of bad news from their attorneys. Unlike most Americans, who may take for granted that they are entitled to seek legal redress if they are wrongfully injured, these future asbestos victims will find that they have been locked out of the courthouse. Their right to put their case before a jury selected from the community will have been transformed into an application for compensation under an administrative scheme. The courthouse door will not have been slammed shut by their elected legislators. It will have been the work of private individuals and their attorneys who were permitted by courts to trade away not only their own right to sue, but also the rights of future victims.

Judge Becker, writing for a unanimous court below, correctly characterized this case as one of the "great cases that force the judicial system to choose between forging a solution to a major social problem on the one hand, and preserving its institutional values on the other." *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 617 (3rd Cir. 1996).

Conceding that the class action settlement represented "arguably a brilliant partial solution" to the challenge to the civil justice system posed by asbestos litigation, *Id.*, the Third Circuit nevertheless refused to harm the victims of asbestos disease a second time by sacrificing their rights on the altar of administrative efficiency.

The core of the Third Circuit's decision was to hold this class action to the same standards under Fed. R. Civ. Pro. 23 that would be applied to certification of a class action being prepared for trial. CCR asserts that the court's approach is a "wholly artificial inquiry" concerned with "hypothetical litigation." Brief for Petitioners at 16. ATLA suggests that the lower court's analysis draws into sharp focus a fundamental problem that would otherwise be lightly dismissed as a "settled" issue:

[T]he settlement would extinguish asbestos-related causes of action of exposed individuals who currently suffer no physical ailments, but who may, in the future, develop possibly fatal asbestos-related disease. These "futures claims" of "exposure-only" plaintiffs would be extinguished even though they have not yet accrued.

83 F.3d at 617.

Claims seeking money damages for asbestos injuries are legal in nature and the claimants' right to trial by jury is clearly protected by the the Seventh Amendment. *Curtis v. Loether*, 415 U.S. 189 (1974). It may be true that class members stand to receive valuable consideration in return for giving up their remedy in the tort system. Brief for Petitioners at 14. If the court addressing certification takes the settlement into account, the rights of "futures" will be extinguished primarily on the basis of fairness of the monetary terms of the settlement and adequacy of representation. The right of a individual claimant to choose whether to relinquish his or her right to a trial by jury has been removed from consideration, rendered invisible.

The Third Circuit at several points expressed misgivings as to due process implications of extinguishing the rights of "futures." *E.g.*, 83 F.3d at 617 & 623. Because the court based its reversal on the application of Rule 23, it did not specifically address the constitutional issue raised by ATLA to the district court: Amicus respectfully asks this Court to address explicitly what is implicit in the Third Circuit's decision -- that a class of claimants may not use the mechanism of a class settlement to trade away the constitutional right of future claimants to trial by jury.

## II. THE RIGHT TO TRIAL BY JURY IS FUNDAMENTAL AND ANY INFRINGEMENT MUST BE STRICTLY SCRUTINIZED.

### A. Any Curtailment Of The Right To Civil Trial By Jury, Explicitly Guaranteed By The Constitution, Must Be Strictly Scrutinized And Justified By A Compelling State Interest.

Government actions which impinge upon fundamental rights must be reviewed under a standard of strict scrutiny: Only those which are necessary to advance a compelling state interest and do so in the least restrictive manner are permissible. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). Fundamental rights are those which are "explicitly or implicitly guaranteed by the Constitution." *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1972).

The Seventh Amendment guarantees the right to trial by jury in civil cases.<sup>1</sup> Congress has restated this guarantee even more forcefully for federal courts:

<sup>1</sup> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Fed. R. Civ. Pro. 38(a).

This Court has repeatedly emphasized that "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimmick v. Schiedt*, 293 U.S. 474, 486 (1935), quoted in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959); and in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990) ("this Court has carefully preserved the right to trial by jury where legal rights are at stake.").

It has been noted that "the scope and effect of the Seventh Amendment . . . perhaps more than with any other provision of the Constitution, are determined by reference to the historical setting in which the Amendment was adopted." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 339 (1979) (Rehnquist, C.J., dissenting). It has also been observed that this right has suffered a "gradual process of judicial erosion." *Id.* At times it has even become the object of disparagement, perhaps because its history has become overlooked or unappreciated. See Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History*, 44 Hastings L.J. 579 (1993).

### 1. The right to trial by jury in civil cases was an important element in the struggle for independence.

The jury trial is not a merely a procedural feature of our civil justice system. A war was fought, and lives lost, to win this right. The jury was immensely popular among the

U.S. Const., amend vii.

American colonists. They admired the heroism of Edward Bushnell and the other jurors who refused to convict Quaker William Penn in 1670, though they were fined and jailed by the trial judge. See John Guinther, *THE JURY IN AMERICA* ch. 1 (1988)

In 1688, a jury acquitted seven Anglican bishops of seditious libel for signing a letter in opposition to James II. This case elevated the jury in public esteem "as a bulwark of liberty, as a means of preventing oppression by the Crown." Austin Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 676 (1918). "Treatises extolling the jury flooded the market and profoundly influenced eighteenth century American as well as English views about jury trial." *Id.*

The colonists followed the lawsuits of John Wilkes and his printer against officials bent on preventing his allegedly seditious publication, resulting in a large jury award of punitive damages. *Wilkes v. Wood*, Lofft 1, 98 Eng. Rep. 489 (K.B. 1763) and *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 768 (C.P. 1763). "Wilkes' case and his ongoing conflicts with the British administration were a matter of keen interest in the American colonies. South Carolina went so far as to provide Wilkes monetary support for one of his political campaigns." Landsman, *supra*, at 591. Wilkes' case was cited in debates in support of the need for constitutional protection of the civil jury. See *PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1778-1788*, 781-82 (John B. McMaster & Frederick D. Stone eds. 1988)(statement of Robert Whitehall at Pennsylvania ratifying convention).

At the same time, the colonists found themselves frequently deprived of civil jury rights. "Because of the jury's power, the British authorities increasingly sought to either control or avoid jury adjudications. The struggle over jury rights was, in reality, an important aspect of the fight for American independence and served to help unite the colonies." Landsman, *supra*, at 596. A primary grievance of

the American colonists was the extensive effort by England to shift the adjudication of civil and criminal disputes from colonial courts, where local juries sat, to Vice-Admiralty courts and other non-jury tribunals administered by judges beholden to the Crown. See Carl Ubbelohde, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* 209-11 (1960); Roscoe Pound, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 69-72 (1957); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 654 (1973). The colonists complained bitterly of this infringement through the Stamp Act Congress, the Continental Congress, and, finally, in the Declaration of Independence. Landsman, *supra* at 595-97.

## 2. The Adoption of the Seventh Amendment Was Crucial to Ratification of the Constitution.

Independence from England did not diminish the sacredness of the jury in the eyes of the new Americans. On Sept 12, 1787, as the Constitutional Convention was nearing the end of its work in Philadelphia, Wilson "observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it." A motion to add that right to Art. III, §2, cl.3, which guaranteed trial by jury in criminal cases, failed. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289 (1966). That omission suggested to many that the constitution represented "virtual abolition of the civil jury" and very nearly doomed ratification of the entire constitution. Henderson, *supra*, at 295-98; Wolfram, *supra*, at 672 n.89.

During the ratification debates in the various states, the Antifederalists, repeatedly expressed their fear that, absent some specific constitutional provision to the contrary, the new federal Congress could eliminate jury trials in civil cases in the federal courts. James S. Campbell and Nicholas Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold*, 128 Univ. of Pa. L. Rev. 965, 971 (1980); see, e.g. 3

THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 218 (J. Elliot 2d ed. 1836)(remarks of James Monroe at the Virginia ratification convention). Justice Story subsequently recounted that this point "was pressed with an urgency and zeal, which were well nigh preventing its ratification." Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 653 (R. Rotunda & J. Nowak eds. 1987) (1833).

Ultimately, the promise of a Bill of Rights, including civil jury rights, won support for the new constitution.

As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by congress; and which received an assent of the people, so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people.

*Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 445 (1830).

#### **B. The Seventh Amendment Was Designed To Limit Judicial Power and Enhance Self Government Through the Participation of Ordinary Citizens in Jury Trials.**

Those who fought so strenuously for this right in 1791 saw the jury as an essential element of limited, democratic government. The jury was intended as a check on the power of the federal judiciary. Morris S. Arnold, *A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation*, 128 U. Pa. L. Rev. 829, 832-35 (1980). Reacting to their experiences at the hands of autocratic British judges,

The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.

*Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979)(Rehnquist, C.J., dissenting).

In addition, the new Americans regarded juries "as more than a 'mode of trial'; they were instruments of local government as well." Arnold, *supra*, at 833. See also, Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 144-49 (1991).

Scholars have concluded on the basis of the historical records of the period that the civil jury, and most especially the right to serve on civil juries, was viewed as a political right of immense importance to independence and self-government. See, e.g., Vidram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203, 218 (1995); Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History*, 44 Hastings L.J. 579, 595-97 (1993); Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, and the Politics of Jury Power*, 91 Colum. L. Rev. 142 (1991).

In early colonial times, the jury was the essential instrument of governance, providing one of the few experiences common to virtually every citizen. In Massachusetts, for example, one historian characterizes the jury as the central instrument of governance. Its wide-ranging activities starkly contrasted with the circumscribed operations of both the royal executive and colonial legislature. William E. Nelson, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975).

Spokesmen on all sides of the ratification debate recognized that the jury box as well as the ballot box were fundamental prerequisites to majoritarian self-government. As the state legislators would protect their constituents against oppression by the central government, so too jurors could be expected to "interpose" themselves against the central tyranny

through the devices of presentments, nonindictments, and general verdicts. Indeed, the ratification debates abounded with analogies between legislatures and juries. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1186, 1188 (1991). Jefferson ventured that "[w]ere I called upon to decide whether the people had best be omitted in the Legislation or Judicial department, I would say it is better to leave them out of the Legislative," quoted in Amar, 100 Yale L.J. at 1188.

The jury role in self-government was all the more critical to the Antifederalists, who viewed the Constitution as an essentially aristocratic document, creating a Congress that would serve the elite and possess "an insufficient sense of sympathy with, and connectedness to, ordinary people." *Id.* at 1140. Popular representation in the judicial branch was needed so that national laws, adopted by persons unfamiliar with local circumstances, would be modified in their application by representatives better acquainted with local needs and customs. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism From the Attack on "Monarchism" to Modern Localism*, 84 N.W. U. L. Rev. 74, at 91 (1989). To the antifederalists, the absence of the civil jury "would fatally weaken the role of the people in the administration of government." Herbert Storing, *WHAT THE ANTI-FEDERALISTS WERE FOR* 19 (1981).

Alexis de Tocqueville analogized the jury to:

... a gratuitous public school, ever open, in which every juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even the passions of the parties... I look upon [the jury] as one of the most efficacious means for the education of the people which society can employ. . . .

1 Alexis de Tocqueville, *DEMOCRACY IN AMERICA* 295-96 (Bradley rev. ed. 1945). He concluded that "the jury is, above all, a political institution, and it must be regarded in that light in order to be duly appreciated." *Id.* at 293.

In short, the Seventh Amendment was designed to protect not only the civil right to have one's case tried to a jury, but also the political right to serve as a juror. *See generally*, Vidram David Amar, *supra*, at 218.

This role of the jury as an instrument of self-government has been well recognized by this Court. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2085 (1991); *Dimick v. Schiedt*, 293 U.S. 474, 485-86 (1934); *Galloway v. United States*, 391 U.S. 372, 397-400 (1943) (Black, J., dissenting); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 338-44 (1979) (Rehnquist, J., dissenting). Consequently, the Court has emphasized, "The right of jury trial in civil cases at common law . . . should be jealously guarded by the courts" *Jacob v. New York*, 315 U.S. 752, 753 (1943). *See also*, *Lyon v. Mutual Benefit Assoc.*, 305 U.S. 484, 492 (1939) ("It is essential that the right to trial by jury be scrupulously safeguarded").

ATLA suggests that the standard the Petitioner advocates for certification of settlement classes under Fed. R. Civ. Pro. 23 would remove this scrupulous judicial protection, by rendering the jury rights of future victims "invisible" to the courts. The "settlement" standard accomplishes this by allowing the parties to shift common law claims -- including the claims of future victims -- to a non-jury forum, undermining the civil jury in precisely the manner which the framers of the Seventh Amendment sought to prevent.

## II. THE PROPOSED SETTLEMENT VIOLATES THE RIGHT OF FUTURE CLAIMANTS UNDER THE SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY.

### A. Seventh Amendment Precludes Shifting of Common Law Claims To A Non-Jury Tribunal

The claims of asbestos victims for monetary damages are clearly within the Seventh Amendment guarantee of the right to trial by jury in "suits at common law." *Curtis v. Loether*, 415 U.S. 189, 196 (1974). By a perverse alchemy, the class action settlement in this case transformed those legal claims into scrip which can only be redeemed through the bureaucratic compensation scheme devised by CCR.

A worker who develops an asbestos disease years from now will find that his right to present his case to a jury in a tort action has already been traded away. As to these future victims of asbestos-related disease, the right to trial by jury has surely not been "preserved" as commanded by the Seventh Amendment. Their claims have effectively been kidnapped -- spirited away to a forum that does not recognize that right.

This Court addressed an analogous situation in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 109 S. Ct. 2782 (1989). The issue there was whether Congress could authorize district courts to refer claims of fraudulent conveyance, which could otherwise be adjudicated by the district court, to Bankruptcy Courts. This Court held that neither Congress nor the courts may strip claimants asserting "private rights" of their Seventh Amendment guarantee of trial by jury merely by transferring the claims to a non-jury tribunal.

Justice Brennan, writing for the majority, explained that Congress may assign statutory claims involving "public rights," -- matters in which the government is a party or which are closely intertwined with a federal regulatory program -- to a forum in which jury trials are unavailable. But in "private tort, contract, and property cases, as well as a vast array of other cases, "Congress may not deprive parties litigating over that right of the Seventh Amendment's

guarantee to a jury trial." *Granfinanciera*, 109 S. Ct. at 2795-96. "[N]or can Congress conjure away the Seventh Amendment by mandating that traditional legal claims be brought there or taken to an administrative tribunal." *Id.*

Although the Court's language is directed at the power of Congress, it seems clear that the Seventh Amendment prohibition against referring legal claims involving private rights to non-jury adjudicators applies with equal force to actions of the district courts. See G. Ray Warner, *Rotten To the "Core": An Essay on Juries, Jurisdiction and Granfinanciera*, 59 U.M.K.C. L. Rev. 991, 1011 (1991).

ATLA suggests that the constitutional teaching of *Granfinanciera* applies to the issue facing this Court. The class action settlement seeks to transfer, prospectively, common law claims that otherwise would clearly be subject to the Seventh Amendment to a forum in which juries are not available. Absent a valid waiver, this deprivation of future claimants' right to trial by jury clearly violates the Seventh Amendment.

### B. Notice and Opt-Out At the Time of Certification of the Class Do Not Afford Future Claimants the Opportunity For Knowing And Intelligent Waiver Of The Right To Trial By Jury.

#### 1. Waiver of the Right to Trial by Jury Must Be Knowing and Intelligent.

A party may, of course, waive the right to a jury trial. Waiver of constitutional rights must be "voluntary, knowing, and intelligent." *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972). This includes waiver of trial by jury, which must be knowing and intelligent in light of the circumstances of each case. *Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938); *Adams v. United States*, 317 U.S. 269 (1942). While *Johnson* and

*Adams* involved the right to jury trial in criminal cases, this Court's opinion in *Overmyer*, a civil case, applied the same standards the Court set forth in its criminal decisions. See *Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084, 1095 (3d Cir. 1988). See also *Moore v. Fragatos*, 321 N.W.2d 781 (Mich. App. 1982)(invalidating medical malpractice arbitration agreement, indicating that civil parties are entitled to the same degree of protection regarding waiver of jury trial as criminal defendants).

The United States Courts of Appeals have overwhelmingly held that contractual waiver of the right to trial by jury by one who has not yet suffered harm must be knowing, intelligent and voluntary. See, *Hulsey v. West*, 966 F.2d 579, 581 (10th Cir. 1992); *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir. 1986); *K.M.C. Co, Inc. v. Irving Trust Co*, 757 F.2d 752, 755-56 (6th Cir. 1985). See also *Broemer v. Abortion Services of Phoenix*, 840 P.2d 1013, 1017 (Ariz. 1992)(contractual agreement between a patient and doctor to submit malpractice claims to arbitration was unenforceable where "there was no conspicuous or explicit waiver of the right to a jury trial or any evidence that such rights were knowingly, voluntarily and intelligently waived.")

## 2. Notice to Class Members Does Not Result in Knowing and Intelligent Waiver.

Prior to approving this settlement, the district court oversaw an extensive campaign to notify the members of the class, inform them of the terms of settlement, and provide them with an opportunity to opt out of the class. ATLA submits that this notice was inherently inadequate as a basis for a knowing and intelligent waiver of jury rights.

This Court has indicated that the "opt-out right is required . . . where personal monetary relief is being sought [because] the individual class members may have a strong interest in pursuing their own litigation." *Penson v. Terminal*

*Transport Co.*, 634 F.2d 989, 993 (5th Cir. 1981). Indeed, the Court has held "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing an "opt out" or "request for exclusion" form to the court." *Phillips Petroleum v. Shutts*, 472 U.S. 797, 811 (1985). Cf. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), cert. dismissed as improvidently granted, 114 S. Ct. 1359 (1994)(where Brown had no opportunity to opt out of class action, "there would be a violation of minimal due process if Brown's damage claims were held barred by *res judicata*.").

In the circumstances surrounding future victims, however, the failure to return an opt-out form cannot reasonably be deemed a knowing and intelligent waiver of the right to trial by jury. As this Court warned in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950), "[W]hen notice is a person's due, process which is a mere gesture is not due process." 339 U.S. at 314-15.

For such notice to serve as a basis for a valid waiver on the part of a person who has not yet developed any sign of asbestos disease would require the recipient to use not one, but two crystal balls -- one with perfect insight into the past and another with a clear view of the future.

Many persons are simply not aware that they were exposed to asbestos at some time in the past. Often workers were not told that the powdery material they were working with was asbestos. For a striking example, the Court need look no further than to a case currently before it. *Metro-North Commuter Railroad Co. v. Buckley*, No. 96-320, cert. granted Nov. 1, 1996. In addition, not every exposed person actually worked with asbestos on a daily basis. Mesothelioma, perhaps the most severe asbestos-caused disease, can be caused by relatively brief exposure decades earlier. *Georgine*, 83 F.3d at 633. A leading scholar in the field of class actions pointedly states:

For class members who cannot currently identify themselves for purposes of protecting their interests with respect to a class action purportedly commenced on their behalf, an opt-out right within a court-designated period of time . . . is of no beneficial use.

1 Herbert B. Newberg, CLASS ACTIONS § 1.23 at 1-55 (1992). As the Texas attorney general suggests, people who do not have accurate information regarding their exposure many years in the past, are likely to treat even individual notices "as junk mail." State of Texas Amicus Brief, *Georgine v. Amchem*, 83 F.3d 610 (3rd Cir. 1996), at 3.

Secondly, even a class member who is aware of his exposure cannot predict what, if any, harm will come to him. He can have no basis for determining whether his medical and financial conditions at the time tragedy strikes would make the settlement more or less advantageous than a tort lawsuit. See Brian Wolfman and Alan B. Morrison, *Representing The Unrepresented In Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. Rev. 439, 513 (1996).

This situation is little more than a new variation on an old injustice: rigid statutes of limitations or statutes of "repose" under which a person's cause of action in tort could become time-barred even before any harm occurred or became manifest. The unfairness of the harsh rule was forcefully portrayed by Judge Frank:

Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a nonexistent railroad. For substantially similar reasons, it has always heretofore been accepted as a sort of logical axiom that a statute of limitations does not begin to run against a cause of action before that cause of action exists.

*Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952). Nearly every jurisdiction has replaced this harsh result

with a "discovery rule," under which the time limit does not begin to run until the person knows or should have known of his or her injury. See, e.g., *Urie v. Thompson*, 337 U.S. 163 (1949). A leading treatise opines: "The fairness and justice of the rule is evident. It would be a travesty of justice if a plaintiff were to lose a meritorious cause of action where he had no way of knowing that an injury or illness was product related." 2A Louis R. Frumer and Melvin I. Friedman, *PRODUCTS LIABILITY* §12.02[3] at 12-28 (1991).

Nor is it fair, ATLA submits, to strip the victim of asbestos disease of the right to a jury trial for failing to opt out of a class action before any sign of the disease became manifest.

### III. DEPRIVING FUTURE VICTIMS OF A MEANINGFUL OPPORTUNITY TO CHOOSE A JURY TRIAL SERVES NO COMPELLING STATE INTEREST.

#### A. The Seventh Amendment May Not Be Sacrificed In Pursuit Of Administrative Efficiency.

The briefs of Petitioners and supporting amici are replete with arguments that the proposed settlement promises substantial savings in time and transaction costs compared with the tort system.

It is true that the growing number of civil actions by persons suffering asbestos-related disease presents "an important challenge to the civil justice system." Deborah R. Hensler, *Asbestos Litigation In the United States: A Brief Overview* (RAND Institute For Civil Justice 1992). However, it must also be recognized that this situation has been imposed on our courts by a long and egregious pattern of wrongdoing by the asbestos industry. Ronald L. Motley, Susan Nial, *A Critical Analysis of the Brickman Administrative Proposal: Who Declared War on Asbestos Victims' Rights?*, 13 Cardozo L. Rev. 1919 (1992)(detailing the "sordid history" of

the asbestos industry's deliberate exposure of American workers to asbestos and its cover-up of the tragic consequences); *Borel v. Fibreboard Corp.*, 493 F.2d 1076, 1084-86, 1092-94 (5th Cir. 1973)(reviewing evidence that defendants ignored known dangers of asbestos and failed to warn workers). In their efforts to meet this challenge, courts must not inflict a second injury on asbestos victims by eliminating their constitutional rights.

Convenience and efficiency, though laudable, do not trump the Seventh Amendment. The *Granfinanciera* Court emphasized this point. "It may be that providing jury trials in some fraudulent conveyance actions . . . would impede the swift resolution of bankruptcy proceedings and increase the expense of Chapter 11 reorganizations. But 'these considerations are insufficient to overcome the clear command of the Seventh Amendment.'" 109 S. Ct. at 2801, quoting *Curtis v. Loether*, 415 U.S. at 198.

As the Chief Justice has observed:

[N]o amount of argument that the device provides for more efficiency or more accuracy or is fairer will save it if the degree of invasion of the jury's province is greater than allowed in 1791. To rule otherwise would effectively permit judicial repeal of the Seventh Amendment . . .

The guarantees of the Seventh Amendment will prove burdensome in some instances; the civil jury was surely a burden to the English governors who, in its stead, substituted the vice-admiralty court. But, as with other provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the right secured by the Amendment.

*Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 348 (Rehnquist, C.J., dissenting).

## **B. The Constitutional Rights Of Future Victims Can Be Preserved By Permitting Opt Out At The Time When Injury Becomes Manifest.**

ATLA, as noted earlier, does not oppose the use of class actions to meet the challenge of mass tort litigation provided that the right to trial by jury is preserved for each and every claimant as demanded by the Seventh Amendment. The previous analogy to the discovery rule suggests that compliance with the Seventh Amendment is feasible in this case without destroying the class action.

ATLA suggests that, regardless of whether the Court affirms or reverses the judgment of the Third Circuit, the Court's opinion make clear that the Federal Rules of Civil Procedure are expressly subject to the dictates of the Constitution, including the Seventh Amendment. Any certification of a class, therefore, must preserve the right to trial by jury of the class members.

Where the settlement class includes future claimants, as in the present case, certification should be conditioned on the presence in the settlement agreement of a provision which recognizes that *those class members who develop an asbestos-related disease in the future will be afforded a reasonable period of time in which to opt out of the class and file a civil action in tort.*

ATLA suggests that preserving claimants' jury rights would not impose an unreasonable burden on CCR or on the operation of the settlement agreement. The fact is that the vast majority of asbestos cases -- over 99% -- end in settlement. Hensler, *supra*, at 9; *In re Joint E. & S. Dists. Asbestos Litigation*, 129 B.R. 710, 747 (E. & S.D.N.Y. 1991). Petitioners assert that the settlement agreement in this case provides compensation that is a "reasonable reflection of historical settlement averages from the tort system," and provides other significant advantages over the tort system. Brief for Petitioners at 14. If that is indeed the case, there is

no reason to anticipate more than a tiny fraction of claimants would choose to exercise their right to a jury trial. The fact that future claimants would be able to "vote with their feet" provides an added incentive for the settling parties to treat the claims of future victims equitably.

A number of commentators have suggested such a delayed opt-out as a means of preserving the rights of future claimants. See Wolfman & Morrison, *supra* at 478. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort class Action*, 95 Colum. L. Rev. 1343, 1347-49 (1995); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 964-68 (1995). Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions,"* 80 Cornell L. Rev. 811, 836 (1995).<sup>2</sup>

Indeed, at least one court has approved a class action settlement that included just such a delayed opt-out for class members who may suffer injury in the future. In *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992), appeal dismissed, 995 F.2d 1066 (6th Cir. 1993), a class action by patients who received defective artificial heart valves, the settlement agreement expressly provides that class members whose heart valves fracture in the future may opt to reject guaranteed compensation and sue for damages at that time. *Id.* at 150.

Addressing the challenge of asbestos litigation does not require sacrificing the constitutional right to trial by jury.

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<sup>2</sup> In fact, the settlement agreement in this case does provide a "back-end opt-out," providing a tort-like procedure for those who are dissatisfied with the offer of compensation under the settlement. However, the procedure is severely restricted as to the number of claimants who invoke it and the issues that may be raised. See *Georgine*, 83 F.3d at 620.

## CONCLUSION

For these reasons, amicus respectfully urges this Court to condition any order approving the fairness of the class action settlement in this case on modification of the settlement agreement which will afford future claimants a meaningful opportunity to exercise his or her right to trial by jury.

Respectfully submitted,

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